IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 16TH AUGUST 2007 / 25TH SRAVANA 1929

MFA.No. 1003 of 2000

AGAINST THE ORDER DATED 29/03/2000 IN R2-.47188/1999/TX of
COMMISSIONER OF COMMERCIAL TAXES, TRIVANDRUM

APPELLANT:

BABU OOMMAN,
M/S.ALPHONSA CASHEW COMPANY,
PUTHOOR, KOTTARAKKARA.

BY ADV. DR.K.B.MUHAMED KUTTY (SR.)

RESPONDENT:

COMMISSIONER OF COMMERCIAL TAXES,
PUBLIC OFFICE BUILDINGS,
VIKAS BHAVAN.P.O., THIRUVANANTHAPURAM.

BY SENIOR GOVRNMENT PLEADER SRI.MUHAMMED RAFIQ

THIS MISCELLANEOUS FIRST APPEAL HAVING BEEN FINALLY HEARD ON 16/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

H.L.DATTU, C.J. & K.T.SANKARAN,J.

M.F.A. NO. 1003 OF 2000 A

Dated this the 16th August, 2007

JUDGMENT

H.L.DATTU, C.J.

This appeal is filed under Section 40 of the Kerala General Sales Tax Act by the assessee being aggrieved by the order passed by the Commissioner of Commercial Taxes, Thiruvananthapuram in Revision Petition No.47188 of 1999 dated 29th March, 2000. By the impugned order, the Commissioner has set aside the order passed by the Deputy Commissioner of Commercial Taxes, Kollam in Revision Petition No.37 of 1998, dated 7th October, 1998.

2. The assessee is a dealer registered both under the provisions of the Kerala General Sales Tax Act, 1963 and the Central Sales Tax Act. The assessee is a cashew exporter having his head office and processing unit at Puthoor and branch at Arackal. The head office as well as the branch office were inspected by the Intelligence Squad of Commercial Taxes Department on 17.4.1993. On such verification, they had prepared the shop inspection reports after verifying the books of accounts maintained by the dealer. The assessee, after such inspection, had compounded the offence departmentally by paying a sum of Rs.1,600/-.

3. The Intelligence Officer once again verified the books of accounts maintained by the assessee at its branch office at Arackal with reference

to shop inspection report for the branch office as on 17.4.1993. According to him, there was a shortage of stock of 8804 kgs. of cashew kernel.

4. The assessing authority had issued notice dated 18th December, 1995, wherein it has specifically stated that there is a shortage of 8804 kgs. of cashew kernel as on 17.4.1993 and had also directed the assessee to show cause why penal interest and prosecution proceedings should not be initiated against the assessee.

5. The said show cause notice came to be replied by the assessee by his reply dated 21.12.1995.

6. By yet another revised notice dated 9.4.1996, based on the certificate of the Assistant Commissioner (Assessment), Special Circle, Kollam, the Intelligence Officer had issued a notice, inter alia mentioning that the shortage of stock was only 66.210 kgs. of cashew kernel as on 17.4.1993. Therefore, had directed the assessee again to show cause why prosecution proceedings should not be taken against him. This was again replied by the assessee by his reply dated 15.4.1996.

7. The Intelligence Officer, Kollam by his notice dated 2.1.1998, by referring to the earlier notices issued on 8.4.1996, 3.7.1996, 1.10.1996, 27.1.1997 and 10.12.1997, had directed the assessee to produce the books of accounts for the assessment year 1992-93 in order to find out the opening stock for the assessment year 1993-94. Further had proposed that for suppression of the excess stock at the time of inspection by the

Intelligence Officer on 17.4.1993, had directed the assessee to show cause why penalty proceedings under Section 45A should not be initiated and completed by imposing a penalty of Rs.3,08,140/-. The said notice came to be replied by the assessee except reiterating that a certificate had been issued by the assessing authority certifying that on stock verification only a shortage of 66.120 kgs was found at the time of inspection on 17.4.1993 and therefore, the Intelligence Officer is not justified in observing that there was shortage of stock of nearly 8804 kgs of cashew kernel at the time of inspection on 17.4.1993.

8. The assessing authority, after giving sufficient opportunity to the assessee to produce the books of accounts for the assessment year 1992-93 and since the assessee failed to produce such books of accounts, has accepted the report of the Intelligence Officer of the Department, who conducted inspection on 17.4.1993 and accordingly, has proceeded to impose a penalty of a sum of Rs.1,84,884/- in exercise of his powers under Section 45A of the Act, by his order dated 7.2.1998.

9. The order so passed by the assessing authority has been revised by the Deputy Commissioner, Commercial Taxes, Kollam, by his order dated 7.10.1998 and in that he is of the opinion that the suppression detected on the date of inspection should be taken as 66.120 kgs. and not 8804 kgs. and accordingly had directed the assessing officer to recalculate the penalty amount.

10. This order of the Deputy Commissioner, Commercial Taxes, Kollam is now reversed by the Commissioner of Commercial Taxes by his order dated 29.3.2000. In the said order he has referred to all the contentions canvassed by the assessee.

11. The assessee was primarily relying upon the certificate issued by the Assistant Commissioner (Assessment), Special Circle, Kollam dated 8.1.1996, to contend that the closing stock position of cashew kernels at the branch office of the assessee as on 31.3.1993 is 8870.210 kgs.

12. Adverting to the certificate on which heavy reliance was placed by the assessee, the Commissioner of Commercial Taxes in its order has observed as under:

> "The certificate issued by the assessing authority is not based on any data or material and hence not reliable. It is evident that the assessee some how arranged to obtain a certificate from the assessing authority showing untrue and incorrect details. The Intelligence Officer, though confronted with the same certificate did not rely on it as it was not based on any ostensible foundation."

13. In view of the above finding, has come to the conclusion that the Intelligence Officer was justified in imposing penalty of Rs.1,84,884/- under Section 45A of the Act and the first revisional authority was not justified in modifying the said order.

14. Aggrieved by the order so passed by the Commissioner of Commercial Taxes, the assessee is before us in this appeal filed under Section 40 of the Kerala General Sales Tax Act. Dr. Mohamed Kutty,

learned counsel appearing for the appellant would contend that the Commissioner of Commercial Taxes was not justified in reversing the order passed by the Deputy Commissioner, Commercial Taxes, Kollam. Secondly, learned counsel would submit that, if for any reason, the Department was aggrieved by the order passed by the Deputy Commissioner, Commercial Taxes, the same could have been revised by the Board of Revenue by calling for the records in exercise of their suo motu powers. Therefore, according to the learned counsel, the Commissioner, Commercial Taxes, was not justified in invoking his powers under Section 37 of the Act. These are the only two contentions canvassed by the learned counsel, Sri.Mohamed Kutty, appearing for the assessee.

15. Learned Government Pleader justifies the order passed by the Commissioner of Commercial Taxes.

16. The first question that requires to be considered and decided by this Court is, whether the Commissioner of Commercial Taxes was justified in reversing the order passed by the Deputy Commissioner, Commercial Taxes, Special Circle, Kollam.

17. The Intelligence Squad of the Department had inspected the head office at Puthoor and branch office at Arackal on 17.4.1993. On verification of the stock found at the time of inspection, at the branch office they have come to the conclusion that the assessee has shortage stock of

8804 kgs of cashew kernels.

18. The Intelligence Officer thereafter had issued notice to the appellant to produce the books of accounts for the assessment year 1992-93 for the purpose of verification of the opening stock for the assessment year 1993-94. For the reasons best known to the assessee only, he did not produce the books of accounts in spite of repeated notice issued by the intelligence officer, but was merely depending on a certificate issued by the Assistant Commissioner (Assmt), Special Circle, Kollam dated 8.1.1996.

19. The certificate so issued by the assessing authority is not accepted by the Intelligence Officer solely on the ground that the assessee had failed to produce the books of accounts for the assessment year 1992-93. In fact, the certificate on which heavy reliance was placed by the assessee is commented on by the Commissioner of Commercial Taxes. According to him, the certificate so produced by the assessee is unreliable in the absence of the books of accounts.

20. In view of the above omission, the Commissioner of Commercial Taxes, in our opinion, was justified in reversing the findings of the Deputy Commissioner of Commercial Taxes. Therefore, we do not find any merit in the first contention canvassed by the learned counsel Dr.Mohamed Kutty, appearing for the appellant.

21. In so far as the second contention canvassed, Section 37 of the Act authorises the Commissioner of Commercial Taxes to initiate suo

motu proceedings, if he is of the opinion that the order passed by the Subordinate Officers is prejudicial to the interest of the Revenue.

22. Section 45A(5) of the Act authorises the Board of Revenue to call for and examine any record passed under sub-section (1) or sub-section (3) of Section 45 A of the Act, for the purpose of suo motu revision.

23. Under the Act, the suo motu powers are given to both the Commissioner of Commercial Taxes as well as the Board of Revenue. The Commissioner can exercise its powers under Section 37 of the Act, if he is of the opinion that the order passed by his subordinate officers is prejudicial to the interest of the Revenue and merely because the Board of Revenue has also that power it does not mean that the Commissioner cannot exercise his powers under Section 37 of the Act. The powers given to the Commissioner as well as the Board of Revenue is to correct the mistakes committed by the authorities under the Act, if for any reason, those orders are prejudicial to the interest of the Revenue. Exercising that power under the Act, the Commissioner has revised the order passed by the Deputy Commissioner of Commercial Taxes. In view of the above, the second contention of the learned counsel for the assessee has no merit whatsoever. Therefore, the appeal filed by the assessee requires to be rejected and it is rejected.

24. In view of the order passed in the Miscellaneous First Appeal, the relief sought for in C.M.P.No.7958 of 2000 need not be considered by

this Court. Accordingly, the said C.M.P is also rejected.

Ordered accordingly.

(H.L.DATTU)
Chief Justice

(K.T.SANKARAN)
Judge

ahz/DK

H.L.DATTU,C.J. &
K.T.SANKARAN, J.

M.F.A.NO. 1003 OF 2000

JUDGMENT

16th August, 2007